



HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.52 of 2001

Bahorandas @ Baba

- Versus -

State of Chhattisgarh

JUDGMENT FOR CONSIDERATION

Sd/-
L.C.BHADOO
Judge

13-10-2007

HON'BLE MR. JUSTICE SUNIL KUMAR SINHA

I agree

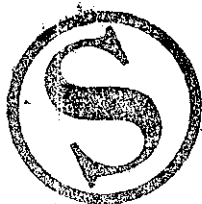
Sd/-
Sunil Kumar Sinha
Judge

15-10-2007

POST FOR PRONOUNCEMENT OF JUDGMENT ON 15th OCTOBER, 2007

Sd/-
L.C.BHADOO
Judge

15th-10-2007



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HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.52 of 2001

APPELLANT:
(In Jail)

Bahorandas @ Baba,
S/o Narsingh Das,
Aged about 52 years,
R/o Village Bhatgaon,
Police Station Bilaigarh,
Distt. Raipur.

- Versus -

RESPONDENT:

State of Chhattisgarh,
Through Police Station Bilaigarh,
Distt. Raipur.

{Appeal under Section 374 (2) of the Code of Criminal Procedure}

Appearance:

Mr. Avinash K. Mishra, counsel for the appellant.

Mr. U.K.S. Chandel, Panel Lawyer for the State/respondent.

Division Bench: **Hon'ble Mr. L.C. Bhadoo and**
Hon'ble Mr. Sunil Kumar Sinha, JJ.

JUDGMENT

(Delivered on 15th October, 2007)

The following judgment of the Court was delivered by L.C. Bhadoo, J.: -

1. This appeal is directed against the judgment of conviction and order of sentence dated 12-10-2000 passed by the 2nd Additional Sessions Judge, Baloda Bazaar, in Sessions Trial No.310/99 whereby and whereunder, learned Additional Sessions Judge after holding the accused/appellant guilty for commission of offence under Section 302 of the I.P.C., sentenced him to undergo imprisonment for life and pay a fine of Rs.10,000/-, in default of payment of fine to further undergo imprisonment for six months.
2. Case of the prosecution, in brief, is that Savitri (since deceased) was resident of Village: Bhatgaon. Accused/appellant Bahorandas @ Baba is also resident of Village: Bhatgaon. He used to visit Savitri oftenly, as her father was not alive and her mother used to leave the house for work. Accused and deceased were in love affair. On 4-6-1999 mother of Savitri had gone to Village: Kannaud to collect mangoes, at about 6 p.m. the accused came to the house of Savitri and asked her as to why she was laughing with other boys at the bus stand. Savitri denied the same on which the accused became angry. In the first instance, he slapped her and thereafter, after pouring kerosene oil on her



body, set her on fire, closed the door and ran away. Savitri tried to extinguish the fire. In the mean time, the accused returned and poured water on her body in order to extinguish the fire. Cousin of Savitri namely, Sudeshi, his daughter Sita, Kotwar of the village and other persons came to the house.

3. The matter was reported in the Police Station by Savitri herself on which the first information report {Ex.P-13(B)} was registered by the Station House Officer, Police Station: Bilaigarh. He left for the scene of occurrence and prepared the site plan (Ex.P-14). Savitri was sent to Community Health Centre, Bilaigarh, where Dr. N.L. Upadhyay examined the burn injuries and prepared injury report Ex.P-9. Accused Bahorandas was also sent for examination of burn injuries and Dr. N.L. Upadhyay after examination, prepared injury report Ex.P-10. Dying declaration of Savitri Ex.P-11 was recorded by Executive Magistrate Jeevan Singh Rajput (PW-8). The Investigating Officer seized a burnt piece of sari, one petty coat, one red colour string of petty coat, one matchbox and half burnt hair of Savitri under Ex.P-2. One blouse was seized under Ex.P-3. One plastic jerry-cane containing 100 gms. of kerosene oil was seized under Ex.P-4. Savitri succumbed to the burn injuries sustained by her in the hospital, therefore, the Investigating Officer, after giving notice Ex.P-6A to the Panchas, prepared inquest Ex.P-7 on her body. Site plan Ex.P-12 was prepared by the Halka Patwari. Seized articles were sent for chemical examination to Forensic Science Laboratory, Sagar, from where report Ex.P-17 was received. Body of Savitri was sent for post-mortem examination to Mekahara, Raipur, where Dr. Sanjay Kumar Dadu conducted post-mortem and opined that the death was due to cardio respiratory failure as a result of burns and its complication. He prepared post-mortem report Ex.P-18.
4. After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate, First Class, Baloda Bazaar who in turn committed the case to the Sessions Judge, Raipur, from where learned 2nd Additional Sessions Judge, Baloda Bazaar received the case on transfer for trial.
5. The prosecution in order to establish charge against the accused examined 18 witnesses. Statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the material appearing against him and stated that he is innocent, he has been implicated in a false case. He examined two witnesses in defence namely, Keshav Prasad Shrivastava & Nirmal Kumar.
6. Learned Additional Sessions Judge after hearing counsel for respective parties, convicted and sentenced the accused as aforementioned.

7. We have heard Mr. Avinash K. Mishra, learned counsel for the appellant and Mr. U.K.S. Chandel, learned Panel Lawyer on behalf of the State/respondent.
8. In this case there is no ocular and direct evidence. Whole case rests on circumstantial evidence i.e.
- (i) the dying declaration (Ex.P-11) made by Savitri before the Executive Magistrate on 5-6-1999 at 8.40 a.m. and before C.B. Pradhan, Station House Officer, Police Station {Ex.P-13(B)}, and
 - (ii) the oral dying declaration made by Savitri before the witnesses.

First circumstance

9. As far as this circumstance is concerned, Mr. Avinash K. Mishra argued that in the first instance, Savitri sustained burn injuries up to 55%, therefore, she was not in a position to give dying declaration, as such, no reliance can be placed on the dying declaration (Ex.P-11) recorded by the Executive Magistrate. He further argued that perusal of dying declaration Ex.P-11 reveals that the fitness certificate¹ given by Dr. N.L. Upadhyay was after recording of the dying declaration and that is why the name 'Upadhyay' has not been written in continuation, but it has been written in two parts.

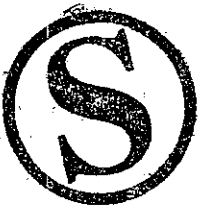
10. Having heard learned counsel for the parties, we have perused the record. In the matter of **Heikrujam Chaoba Singh vs. State of Manipur**¹, the Apex Court while considering the reliability of an oral dying declaration has held that

"An oral dying declaration no doubt can form the basis of conviction, though the Courts seek for corroboration as a rule of prudence. But before the said declaration can be acted upon, the Court must be satisfied about the truthfulness of the same and that the said declaration was made by the deceased while he was in a fit condition to make the statement. The dying declaration has to be taken as a whole and the witness who deposes about such oral declaration to him must pass the scrutiny of reliability."

11. The Apex Court in the matter of **Muthu Kutty and another vs. State by Inspector of Police, T.N.**² held that law regarding dying declaration is that it is an exception to the general rule against hearsay evidence elaborated in Section 60 of the Evidence Act, 1872. The principle on which dying declaration is admitted in evidence is indicated in the legal maxim "nemo moriturus praesumitur mentire – a man will not meet his Maker with a lie in his mouth". Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of

¹ 1999 (4) Crimes 327 (SC)

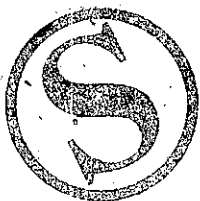
² (2005) 9 SCC 113



evidence. The Apex Court held that though a dying declaration is entitled to great weight, it must be kept in mind that the accused has no power of cross-examination. Such a power is essential for eliciting the truth. This is the reason the courts also insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. The Apex Court further said that it cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

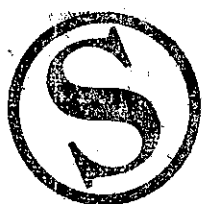
12. The point in question has to be tested in the light of Constitution Bench decision of the Apex Court rendered in the matter of **Laxman vs. State of Maharashtra**³. This was a reference made to the Apex Court in which a question had cropped up as to whether the certificate of Doctor to the effect that the patient is conscious and there was no certification that the patient was in fit state of mind at the time of making the declaration makes the declaration unacceptable and the subjective satisfaction of the Magistrate recording the dying declaration that injured was in a fit state of mind at the time of making declaration cannot be relied on, is the correct enunciation of law? The Apex Court after considering the entire matter held that normally, the Court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. The Apex Court further held that the dying declaration can be oral or in writing and adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. It has also been stated that there is no requirement of law that a dying declaration must necessarily be made to a Magistrate and when such statement is recorded by Magistrate there is no specified statutory form for such recording. Consequently, what evidential value or weight has to be attached to such statement necessarily depends on the facts and circumstances of each particular case. What is essentially required is that the

³ (2002) 6 SCC 710



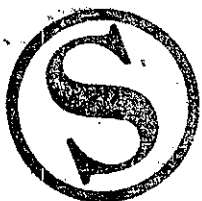
person who records a dying declaration must be satisfied that the deceased was in a fit state of mind. Where it is proved by the testimony of the Magistrate that the declarant was fit to make the statement even without examination by the doctor the declaration can be acted upon provided the Court ultimately holds the same to be voluntary and truthful. The Apex Court has further held that a certification by the doctor is essentially a rule of caution and therefore the voluntary and truthful nature of the declaration can be established otherwise.

13. Applying the above principle, if we scrutinize the evidence of Jeevan Singh Rajput (PW-8), Executive Magistrate, he has stated in his evidence that on 5-6-1999 he was working as Nayab Tahsildar & Executive Magistrate at Bilaigarh Division, on that day he recorded the dying declaration of Savitri, aged 22 years, in question & answer form which is Ex.P-11. He enquired from her about the incident, then she disclosed that Bahorandas attacked her as she is laughing while talking with other boys, thereafter, he slapped her and after pouring kerosene oil on her body, set her on fire. In cross-examination, he has categorically stated that at the time when the dying declaration was being recorded, Dr. Upadhyay was present. It is incorrect to say that he had written the dying declaration on the direction of Police. The dying declaration was recorded at 8.40 a.m. It is incorrect to say that relatives of Savitri were present.
14. In cross-examination of this witness, defence has not been able to elicit any circumstance, which makes the evidence of this witness & dying declaration, doubtful. He has categorically stated that he recorded the dying declaration in question & answer form, he put the questions, Savitri replied those questions and same was written by him. Even though Dr. N.L. Upadhyay has been examined as PW-7 and he has stated in his evidence that there were burn injuries up to 55% on the body of Savitri, her upper part of body was burnt in extensive, her chest, mouth & eyes were also burnt, she was writhing in pain, he immediately forwarded her to Mekahara, Raipur, he has not stated anything that Savitri was not able to speak or understand the questions. There is no reason before the Court to disbelieve the evidence of the Executive Magistrate who has categorically stated that the dying declaration was given by Savitri. Moreover, this dying declaration is corroborated by the fact that Savitri herself lodged the report Ex.P-13(B) in Police Station: Bilaigarh in which she has categorically stated that at about 6 p.m. Bahorandas came to her house, asked her that why she is talking to other boys and laughing, in the first instance, he slapped her, thereafter, after pouring kerosene oil on her body, set her on fire



and ran away. She raised cries, on hearing her cries, he again returned and tried to extinguish the fire. In the mean time, other villagers also came.

15. C.B. Pradhan (PW-14), Assistant Sub Inspector, has categorically stated in his evidence that on 5-6-1999, he was working as A.S.I. in Police Station: Bilaigarh, on that day, Savitri came, lodged the report and disclosed that Bahorandas set her on fire after pouring kerosene oil on her body saying that she is laughing and talking to other boy. Presence of the accused is established from the fact that in the first instance after setting her on fire, he left the place, he again returned and tried to extinguish the fire, during that process he also sustained burn injuries which also establishes from injury report Ex.P-10 prepared by Dr. N.L. Upadhyay (PW-7) after his examination on 5-6-1999.
16. Now, coming to the question of certification by the doctor with regard to the fact that whether Savitri was in a fit state of mind at the time of giving dying declaration, Dr. N.L. Upadhyay (PW-7), who gave certificate on the dying declaration (Ex.P-11), has been examined, but he has not been asked by the counsel regarding certification given by him nor he has been cross-examined on this aspect whether he gave the certificate or not. But Executive Magistrate Jeevan Singh Rajput (PW-8) has stated in his evidence that when he recorded the dying declaration, the doctor was present. The Executive Magistrate categorically stated that Savitri gave dying declaration. As has been held by the Apex Court in the Constitution Bench decision in Laxman's case, certification by the doctor is essentially a rule of caution, the dying declaration can be acted upon and established without such certification, if on the facts and circumstances of the case it is established that the dying declaration made by the deceased was voluntary and truthful in nature, if it can be established otherwise. Therefore, certification by the doctor regarding fitness of the deceased is one of the modes to satisfy that the declarant was in a fit state of mind to give statement. If for any reason certificate of the doctor cannot be obtained, then the dying declaration of the declarant cannot be discarded merely on that ground, if in the given facts and circumstances it is established otherwise that the declarant was ~~was~~ in fit state of mind.
17. Applying the above principle, if we look into the material and evidence available on record in the present case, in the first instance, Savitri, the declarant, herself lodged the report {Ex.P-13(B)} at Police Station: Bilaigarh before C.B. Pradhan (PW-14), Assistant Sub Inspector, who has categorically stated in his evidence that the report was lodged by Savitri herself. There were burn injuries on her body up to 55%. She sustained burn injuries on 4-6-1999 at about 6 p.m., she lodged report in the Police Station on the next day morning at 8.35 a.m. and on

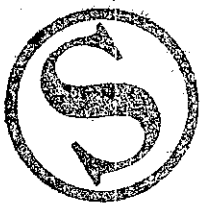


the very same day the dying declaration (Ex.P-11) was recorded by the Executive Magistrate at 8.40 a.m., just five minutes after the report {Ex.P-13 (B)} was lodged by Savitri. In the circumstances, based on the above material, it can safely be held that when the Executive Magistrate recorded her dying declaration she was in a fit state of mind to give the dying declaration. Therefore, the evidence of Jeevan Singh Rajput (PW-8) inspires confidence and explicit reliance can be placed on this evidence that even without the evidence of doctor regarding fitness of mind of the declarant at the time of dying declaration it can be held that Savitri was in fit state of mind to give the dying declaration.

Second circumstance

18. Apart from the dying declaration (Ex.P-11) made before the Executive Magistrate and the dying declaration {Ex.P-13(B)} made before the Assistant Sub Inspector, Police Station: Bilaigarh, Savitri made oral dying declaration before other independent witnesses. This fact has been proved by Kum. Sita (PW-1), daughter of Sudeshi, who is a girl, aged 14 years. She has stated in her evidence that on the fateful day she was at her residence, she heard the sound of quarrel between the accused & deceased Savitri. The accused gave beating to Savitri by saying that why she was laughing at her aunt's hotel. After hearing the commotion, she (PW-1) went to that side and saw that Savitri was burning, she was saying that Bahorandas has set her on fire after pouring kerosene oil on her body. Thereafter, the Kotwar was called by her father and they went to Bilaigarh. When other persons came, they also enquired from Savitri, to them also she disclosed that Bahorandas has set her on fire after pouring kerosene oil on her body. In cross-examination she has stated that it is correct that after seeing Marpit in the room she came to her house, when her father came, she went along with her father again to Savitri's room. Savitri & Bahorandas were in love affair. She has further stated that when they went, Savitri asked for water, but the accused was not present there.

19. Her father Sudeshi has been examined as PW-2. He has corroborated the evidence of PW-1 and stated that at about 8 p.m. Savitri was already in burnt condition, on enquiry she disclosed that the accused has set her on fire, even his daughter also disclosed that Bahorandas has gave beating to Savitri and set her on fire. She was asking for water again and again, they gave water to her. Savitri disclosed that the accused gave beating and set her on fire suspecting her fidelity. He went to Kotwar and called him. They could not arrange for any transportation to take Savitri to Bilaigarh. Bahorandas used to visit Savitri, he (PW-2) asked Bahorandas not to visit the house of Savitri, he



persuaded Savitri also not to allow Bahorandas to visit her house, but they did not accede to his request. In cross-examination, he has categorically stated that he did not saw the accused setting Savitri on fire, but Savitri disclosed that the accused set her on fire. In that night itself he and Kotwar had not gone to Bilaigarh, on the next day morning they had gone to Bilaigarh.

20. Laxman (PW-3) has turned hostile. He has simply stated in his evidence that he saw Savitri in burnt condition and he saw Sudeshi there. Dilbahar (PW-4) & Jagesari Bai (PW-5) have also turned hostile.
21. Ghasi Das (PW-12) has also stated in his evidence that on the fateful day, Dilbahar, Swadeshi & Kotwar called him therefore, he went to the house of Savitri along with them, Kotwar Pandas was also there. Pandas Kotwar enquired from Savitri as to what has happened, Savitri told that Bahorandas Baba has set on fire after pouring kerosene oil on her body. In cross-examination, he has stated that he himself did not enquire anything from her.
22. Panchdas (PW-13) has also stated same thing in his evidence that Savitri disclosed that Bahorandas set her on fire. In cross-examination of these witnesses defence has not been able to elicit any circumstance, which makes the evidence of these witnesses unreliable or untrustworthy.
23. Dr. Sanjay Kumar Dadu (PW-18) has stated in his evidence that he conducted post-mortem on the body of Savitri on 6-6-1999, there were burn injuries on her body, head hairs were in burnt condition, eye brows were burnt, burn injuries were of 1st & 2nd degree, at places skin was peeled of, and burn injuries were present on neck, chest, stomach, both the hands, iliac rest & legs. Cause of death was shock and asphyxia on account of burn injuries.
24. Therefore, from the above evidence of independent witnesses, it is established that Savitri gave oral dying declaration before the above witnesses. All these witnesses are independent witnesses. Father of Savitri was not alive, whereas her mother used to go out of the house for earning livelihood and at that time, the accused used to visit the house of Savitri. There is no reason for these witnesses to implicate the accused in a false case. Moreover, the Executive Magistrate is a Gazetted Officer and public servant who has categorically stated in his evidence that the deceased gave dying declaration Ex.P-11. For him also there was no reason to give false evidence, unless and until something is brought on record in his cross-examination, which creates doubt regarding impartiality and straightforwardness of the public servant.
25. Learned counsel for the appellant also argued that Dr. N.L. Upadhyay (PW-7) in cross-examination has stated that on account of burn injuries up to 50-60%

the patient remains perturbed and in semi-conscious condition, the patient is not able to understand what he is saying. In view of the above evidence of the doctor, Savitri was not fit to give statement.

26. But, we do not find any substance in this argument for the reason that this is the general statement given by the doctor, he has not been cross-examined specifically with regard to Savitri that when he examined Savitri on 5-6-1999 whether she was in a fit state of mind to give statement or not without which the general type of statement given by the doctor in his cross-examination is of no help to the accused, because he is the doctor who in the first instance, attended Savitri. He has not been cross-examined on the aspect regarding her mentality whether she was in a fit state of mind to give statement or not.

27. Two defence witnesses have been examined by the accused who have stated in their evidence that when they went to the house of Savitri they saw her in burnt condition. Keshav Prasad Shrivastava (DW-1) has stated in his evidence that on enquiry, from his sister-in-law, she disclosed that Savitri set herself on fire. Nirmal Kumar (DW-2) has also stated in his evidence that he enquired from Sarita and she said that Savitri set herself on fire. But this defence has not been raised in cross-examination of the prosecution witnesses. Moreover, learned counsel for the appellant has also not argued on this point. Therefore, in the presence of dying declarations {Exs.P-11 & P-13(B)} and oral dying declaration, evidence of these witnesses cannot be believed. Moreover, Sarita has not been examined, who had informed these two witnesses that Savitri set herself on fire.

28. In the circumstances, for the foregoing reasons, we are of the considered opinion that the trial Court has rightly believed the prosecution evidence and held the accused/appellant guilty. We do not find any illegality or infirmity in the judgment of the trial Court.

29. In the result, the appeal, being devoid of merit, is liable to be dismissed and it is hereby dismissed.

Sd/-
L.C.BHADOO
Judge

15-10-2007

Sd/-
Sunil Kumar Sinha
Judge

15-10-2007